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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Request for	)	
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Declaratory Ruling Regarding the Use of Section 252(i) To Opt Into Provisions Containing Non-Cost-Based Rates	)	

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GTE PETITION FOR DECLARATORY RULING

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SUMMARY

Section 252(i) of the Communications Act requires that an ILEC make available to requesting CLECs any interconnection, service, or network element in an approved interconnection agreement on the same terms and conditions as in the original agreement. In its *Local Competition Order*, the Commission noted that the 1996 Act clearly contemplates that interconnection agreements should be cost-based. Therefore, the Commission adopted Rule 51.809 which provides that ILECs are not required to make available under Section 252(i) provisions of interconnection agreements which are no longer cost-based. However, a number of carriers have requested that they be allowed to "opt into" provisions under Section 252(i) even though the underlying circumstances have changed so that the rates are no longer cost-based.

For example, this issue has been raised in the context of reciprocal compensation on ISP-bound traffic and where CLEC switching rates are based on the ILEC's switching rates. Although GTE interconnection agreements did not include provisions requiring GTE to pay reciprocal compensation on ISP-bound traffic, some state decisions subsequent to the adoption of those agreements have mandated that such compensation be paid. As a result, GTE is losing millions of dollars because the rates in the interconnection agreements are not cost-based under these changed terms. Allowing CLECs to opt into these arrangements is inconsistent with the Act, the Commission's Rules, and the proposals in the recent *ISP-Bound Traffic Notice*.

Similarly, CLECs have requested to opt into switching rate provisions which are not based on the costs they incur. State commissions often determined CLEC switching rates assuming that CLEC networks would be designed in the same

configuration as ILEC networks. However, many CLECs have taken advantage of new technologies to reduce switching costs and do not use the ILEC end-office/tandem architecture. Therefore, allowing a CLEC to opt into tandem switching rates when the CLEC does not use tandems would compensate the CLEC for costs it is not incurring and would lead to non-cost-based rates.

The Commission staff has informed GTE that it may be subject to complaints on these issues, which have also been raised before several state commissions. In order to avoid multiple proceedings and provide states with appropriate guidance, GTE urges the Commission to issue a declaratory ruling that CLECs cannot opt into interconnection agreement provisions which are no longer cost-based. In the alternative, the Commission should issue a temporary stay on such opt-ins and consider this issue in the *ISP-Bound Traffic Notice* proceeding.

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GTE Petition for Declaratory Ruling

GTE Service Corporation and its affiliated domestic telephone operating companies (collectively "GTE")[1] respectfully request that the Commission issue a declaratory ruling that requesting telecommunications carriers cannot use Section 252(i) of the Communications Act to "opt into" provisions of interconnection agreements where the cost or rate element in a provision is no longer cost-based. This issue has arisen, for example, in the context of reciprocal compensation on ISP-bound traffic and where CLECs receive compensation based on an ILEC's switching rates. In both of these cases, the rates and costs CLECs are requesting are no longer cost-based so allowing a requesting carrier to opt-into these arrangements would be contrary to

[1] GTE Alaska, Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., GTE West Coast Incorporated, and Contel of the South, Inc.

Section 51.809 of the Commission's Rules.[2] GTE urges the Commission to issue a declaratory ruling clarifying that ILECs do not have to make available provisions of interconnection agreements under Section 252(i) if those provisions are no longer cost-based. In the alternative, the Commission should hold any complaints regarding this issue in abeyance and consider the use of Section 252(i) for non-cost-based rates and costs in the *ISP-Bound Traffic Notice* proceeding.[3]

I. A COMMISSION RULING IS NEEDED CLARIFYING THAT CLECS CANNOT OPT INTO EXISTING ARRANGEMENTS WHICH ARE NO LONGER COST-BASED.

Section 252(i) of the Communications Act requires that a local exchange carrier "make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."[4] In the *Local Competition Order,* the Commission adopted Section 51.809 to implement 252(i).[5] Considering this rule, the Commission concluded that "[n]ational standards will help state commissions and parties to expedite the resolution

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[2] 47 C.F.R. § 51.809.

[3] Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 (rel. Feb. 26, 1999). Although the Declaratory Ruling and Notice were issued as part of one order, they will be hereinafter referred to as the "*ISP-Bound Traffic Declaratory Ruling*" and the "*ISP-Bound Traffic Notice*," respectively.

[4] 47 U.S.C. § 252(i).

[5] Although initially vacated by the Eighth Circuit in *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), this rule was recently reinstated in *AT&T v. Iowa Utilities Board*, 119 S.Ct. 721 (1999).

of disputes under section 252(i)."[6] The Commission recently reaffirmed the need for national rules by raising additional Section 252(i) issues for consideration in the *ISP-Bound Traffic Notice*.[7]

GTE is aware that a number of parties have raised the question at the Commission of whether CLECs should be allowed to opt into provisions of interconnection agreements requiring ILECs to pay reciprocal compensation on ISP-bound traffic and containing non-cost-based switching rates. Similar inquiries have also been brought to several state commissions. GTE has been advised by the Commission staff that GTE will likely be subject to several Accelerated Docket complaints as a result of its position that Section 252(i) should not be used for provisions in which the rates are no longer cost-based. Multiple complaints before the Commission and several states are not the appropriate manner to resolve this issue.

To avoid duplicative proceedings at the Commission and to ensure that states have appropriate guidance, the Commission should issue a declaratory ruling prohibiting the use of Section 252(i) to opt into interconnection agreement provisions calling for ILEC payment of reciprocal compensation for ISP-bound traffic or any other provision where the underlying rate is no longer cost-based. In the alternative, the Commission should defer consideration of any complaints filed on this issue and consider it as part of the *ISP-Bound Traffic Notice*. The Commission has raised another

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[6] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, 16137 (1996) ("*Local Competition Order*").

[7] *ISP-Bound Traffic Notice*, ¶ 35.

Section 252(i) issue in that proceeding so the issue of opting into non-cost-based rates could be easily included.

II. ALLOWING REQUESTING CARRIERS TO OPT INTO INTERCONNECTION AGREEMENT PROVISIONS WHICH ARE NO LONGER COST-BASED IS INCONSISTENT WITH THE COMMUNICATIONS ACT'S REQUIREMENTS AND THE COMMISSION'S RULES.

A. The Communications Act and the Commission's Rules require that the provisions of interconnection agreements be cost-based.

Section 252(d) of the Communications Act requires that interconnection, unbundled network element, reciprocal compensation, and wholesale discount rates all be cost-based. In the *Local Competition Order's* discussion of Section 252(i), the Commission concluded that Sections 251 and 252 of the Act:

> require that publicly filed agreements be made available only to carriers who cause the incumbent LEC to incur no greater costs than the carrier who originally negotiated the agreement, *so as to result in an interconnection arrangement that is both cost-based* and technically feasible.[8]

Thus, both Congress and the Commission contemplated that interconnection agreements should include cost-based rates.

Section 51.809 of the Commission's Rules provides that ILECs do not have to make available under Section 252(i) provisions of agreements in which the costs of providing a particular interconnection, service, or element to the requesting carrier are no longer cost-based. Provisions requiring the payment of reciprocal compensation on

ISP-bound traffic and certain CLEC switching rates fall within this rule. Therefore, under Section 51.809, requesting carriers should not be permitted to opt into these provisions.

B. Requiring ILECs to pay reciprocal compensation on ISP-bound traffic results in non-cost-based payments.

Forcing ILECs to pay reciprocal compensation on ISP-bound traffic causes ILECs to incur millions of dollars in costs with no corresponding revenues. ILEC local rates are subject to approval by state commissions. On average, an ILEC charges a flat rate of approximately $20 for local service each month. Calls to an ISP typically make use of local switching facilities for significantly longer periods than the average holding time for local telephone calls. Under the terms of some state commission decisions, whenever an ISP is connected to the ILEC through a CLEC, the CLEC is entitled to reciprocal compensation payments for every minute an ILEC customer is connected to an ISP. Since reciprocal compensation charges are usage-based, it does not take much usage for the reciprocal compensation payments to dwarf the flat fee the originating customer pays the ILEC. In GTE's territories, this scenario has resulted in claims for tens of millions of dollars of compensation.

The Commission itself recently acknowledged this problem in the *ISP-Bound Traffic Declaratory Ruling*. In that Ruling, the Commission recognized that "no matter what the payment arrangement, LECs incur a cost when delivering traffic to an ISP that

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[8] *Local Competition Order*, 11 FCC Rcd at 16140 (emphasis added).

originates on another LEC's network. In particular, pure minute-of-use pricing structures are not likely to reflect accurately how costs are incurred for delivering ISP-bound traffic."[9] Several state commissions have also recognized this problem.

For example, in a Texas proceeding involving GTE and CT Cube, the Hearing Examiner found that CT Cube was not entitled to reciprocal compensation on ISP-bound traffic because CT Cube was not performing any switching on this traffic. The Examiner concluded that:

> It is clear that CT Cube does not terminate Internet traffic originating on GTESW's network because it does not switch that traffic. Despite CT Cube's contention that its network configuration forces the telecommunications transport to occur across its lines, CT Cube the ISP could as easily hook directly to the GTESW switch: the lines and the CT Cube Switch are not necessary for the operation of CT Cube the ISP. In practice CT Cube could connect directly to the GTESW switch in San Angelo without any change in the manner in which it provides Internet service, and, CT Cube is ostensibly leasing, at least in part, the transport lines from GTESW as a business customer of GTESW. Permitting CT Cube RC [reciprocal compensation] for Internet service provision, solely on the basis of its chosen network configuration, is to invite CMRS providers to engage in uneconomic investment for the purposes of receiving RC.[10]

Had the Hearing Examiner failed to recognize that CT Cube did not switch ISP-bound traffic, GTE would now be paying reciprocal compensation for functions CT Cube does not perform and would be faced with CLECs attempting to use Section 252(i) to opt into the arrangement. Massachusetts is also looking at whether CLECs serving mostly ISPs

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[9] *ISP-Bound Traffic Declaratory Ruling*, ¶ 29.

[10] Public Utility Commission of Texas Arbitrator's Decision, Petition for Arbitration Pursuant to FTA § 252(b) to Establish an Interconnection Agreement with GTE Southwest Incorporation, PUC Docket No. 20028 at 13 (Feb. 22, 1999).

are indeed legitimate carriers or merely hubbing arrangements for the purpose of collecting reciprocal compensation.[11] Thus, as the Commission and some states have acknowledged, CLEC reciprocal compensation rates for ISP-bound traffic are not cost-based and should therefore not be subject to the provisions of Section 252(i).

GTE's interconnection agreements do not include Internet traffic within the definition of local traffic or subject such traffic to reciprocal compensation obligations. However, after interconnection agreements were already in force, several states adopted decisions requiring that reciprocal compensation be paid on Internet traffic regardless of the terms of the interconnection agreements. Thus, although the provisions of the interconnection agreements were cost-based when they became effective (relative only to circuit-switched local traffic), intervening state decisions have rendered them non-cost-based. Therefore, allowing CLECs to opt into these arrangements is inconsistent with Section 51.809.

C. CLECs should not be allowed to opt into switching rates if they are not performing that type of switching.

In determining interconnection rates, many state commissions assumed that CLEC networks would be developed in the same configuration as ILEC networks and applied the ILEC rate structure and prices to traffic switched by the CLECs. However,

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[11] *ISP-Bound Traffic Declaratory Ruling*, ¶ 24 n.78. In addition, the Missouri Public Service Commission has recently issued an order relieving Southwestern Bell and Birch Telecom of the obligations to immediately pay reciprocal compensation on ISP traffic. The order requires the parties to track Internet traffic until the FCC establishes a compensation scheme. Missouri Pubic Service Commission Order Clarifying Arbitration Order, Case No. TO-98-278 (Apr. 6, 1999).

many CLECs have not set up their networks in the same way as ILECs have. For instance, some CLECs are trying to use Section 252(i) to opt into reciprocal compensation arrangements based on tandem rates even when their networks do not have tandem switches.

An ILEC network typically has far more switches than a CLEC network. ILEC switch locations use direct trunking from one end-office to another only when a sufficient traffic volume justifies high-usage direct trunks. When a sufficient volume of traffic does not exist between any two end-offices, ILECs route originating traffic from an end-office to a tandem on shared or common trunking, switch the calls at the tandem, and terminate the call to an end-office over common trunking.

CLECs often do not utilize the ILEC end-office/tandem architecture. Instead, they utilize a small number of larger switches that are connected directly to customers. This configuration takes advantage of the modular architecture and much greater capacity of today's digital switches, and the availability of inexpensive fiber optic-based transport. Additionally, recent technological developments have made it possible for LECs to avoid circuit-switching on selected calls, especially ISP-bound traffic. New SS7 bypass devices permit calls to selected telephone numbers (*e.g.*, ISPs) to be directly transported to the destination, thereby avoiding circuit-switching, and according to media descriptions, reducing costs by a factor of ten.[12]

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[12] *See ISPs Strongarm GTE; UUNet, Others Demand SS7 Bypass Savings*, ISP Business News, November 9, 1998, at 1 (describing SS7 bypass equipment manufactured by Ascend Communications); *see also* Competitive Carrier Strategies II Workshop, Ascend Communications (visited Apr. 6, 1999) <http://www.ascend.com/3536.html> (offering seminars suggesting "Solutions for

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Allowing CLECs that are not performing tandem or end-office switching for local traffic to receive payments for these functions would compensate them for functions they are not performing and render these payments non-cost-based. Therefore, ILECs should not be required to make available these rate provisions under Section 252(i) to CLECs whose networks do not use tandems or end-office switching.

III. ALLOWING CLECS TO OPT INTO PROVISIONS REQUIRING PAYMENT OF RECIPROCAL COMPENSATION ON ISP-BOUND TRAFFIC IS INCONSISTENT WITH THE COMMISSION'S RECIPROCAL COMPENSATION DECLARATORY RULING AND NOTICE.

In the recent *ISP-Bound Traffic Declaratory Ruling,* the Commission concluded that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate."[13] In the Notice, the Commission seeks comment on proposed inter-carrier compensation schemes for ISP-bound traffic and tentatively concludes that market forces should set such rates "based on commercial negotiations undertaken as part of broader interconnection negotiations between incumbent LECs and CLECs."[14] As explained above, the current reciprocal compensation payments are not based on negotiations between the parties. Rather, some state decisions have required that these payments be made on ISP-bound traffic, regardless of the terms of interconnection agreements or

(...Continued)
turning recent regulations [including the FCC reciprocal compensation decision] into profit opportunities").

[13] *ISP-Bound Traffic Declaratory Ruling,* ¶ 1.

[14] *Id.*, ¶ 29.

the relevant costs. Allowing CLECs to use Section 252(i) to perpetuate the payment of reciprocal compensation ordered by state commissions based on an erroneous interpretation of federal law is inconsistent with this market-based proposal. It also gives CLECs the incentive to continue seeking reciprocal compensation arrangements that the Commission has acknowledged are not cost-based, and conflicts with "the Commission's goals of ensuring the broadest possible entry of efficient new competitors, eliminating incentives for inefficient entry and irrational pricing schemes, and providing to consumers as rapidly as possible the benefits of competition and emerging technologies."[15]

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[15] *ISP-bound Compensation Notice,* ¶ 33.

IV. CONCLUSION

For the foregoing reasons, the Commission should issue a declaratory ruling that CLECs cannot opt into interconnection agreement provisions which are no longer cost-based. At a minimum, the Commission should issue a temporary stay on such opt-ins until this issue has been further explored in the *ISP-Bound Traffic Notice*.

Respectfully submitted,

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